COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2299-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SAMUEL JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN and JOHN FRANKE, Judges. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Samuel Jones appeals from a judgment of conviction entered after a jury found him guilty of attempted first-degree intentional homicide, while armed, as a party to a crime. *See* §§ 940.01(1), 939.63, 939.32 and 939.05, STATS. Jones also appeals from an order denying his motion for postconviction relief. Jones argues: (1) that the evidence is

insufficient to support his conviction; (2) that the trial court erred in failing to dismiss the charges against Jones because Jones was allegedly deprived of his right to a speedy trial; and (3) that the trial court erred in failing to investigate possible juror misconduct. We affirm.

BACKGROUND

On May 30, 1995, Anthony Coleman and Maurice Gentry were walking down 42nd Street in Milwaukee. As they were walking, they encountered two males, whom Gentry knew as Sam and Vop. Vop and Gentry began arguing, and Vop pulled a sawed-off shotgun from the waist of his pants. Gentry hid behind a car that was parked in the street as Vop fired the shotgun at him. Gentry then ran to a house and knocked on the door. While he stood on the porch of the house, Sam, who then had the shotgun, rested the shotgun on the railing of the porch and aimed at Gentry. Gentry ran to the end of the porch and jumped over the railing, and as he did so, Sam shot him in the back of the head.

The day after the shooting, the police arrested Vop, whom they had identified as Laveric Washington. The police asked Washington to identify the person who had shot Gentry. According to the testimony of Officer Gregory Thiele, Washington said that the shooter was named Sam, and he then led the police to Sam's home. The police arrested Jones at the home Washington identified. When the police brought Jones out of the home, Washington confirmed that Jones was the shooter.

At trial, Gentry identified Jones as the Sam who had shot him in the head. Washington, however, testified that although a person named Sam shot Gentry in the head, Jones was not the Sam who had shot Gentry. Washington also testified that, contrary to Officer Thiele's testimony, he did not lead the police to

Jones's home. The jury returned a verdict finding Jones guilty as charged, and the trial court entered judgment accordingly.

DISCUSSION

Jones argues that the evidence is insufficient to support his conviction. Specifically, he claims that the identification evidence was insufficient to support a finding that he shot Gentry. In support of this argument, Jones highlights Washington's exculpatory testimony and asserts that the evidence indicating that Jones was the shooter was inconsistent and unreliable.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757–758 (1990) (citations omitted). Thus, "[t]his court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible -- that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis.2d 199, 218, 458 N.W.2d 582, 590 (Ct. App. 1990).

At trial, Gentry identified Jones as the person who shot him. Gentry also testified that he knew Jones prior to the shooting. Additionally, Officer Thiele testified that Washington, upon his arrest, led the police to Jones's home and identified Jones as the person who shot Gentry. The identification evidence is

not inherently incredible. Any inconsistencies in the identification evidence were before the jury, and were to be evaluated by them. *See* ***State v. Pankow***, 144 Wis.2d 23, 30–31, 422 N.W.2d 913, 915 (Ct. App. 1988) (the jury is to resolve conflicts in the testimony). "We will not substitute the judgment of the jury merely because certain evidence is in conflict or would support a different result." ***Id.***, 144 Wis.2d at 30, 422 N.W.2d at 914. Jones's argument asks us to reweigh the evidence, which we cannot do. We therefore reject Jones's argument that the evidence is insufficient to support his conviction.

Jones also argues that the trial court erred in failing to dismiss the charges against Jones because Jones was allegedly deprived of his right to a speedy trial. Jones's conviction is the result of his second trial on the underlying charge. Jones's first trial resulted in a hung jury. Jones argues that both trials violated his speedy trial rights, and that, therefore, his conviction should be reversed and the charges against him should be dismissed.[1]

The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and Article I, section 7 of the Wisconsin Constitution.[2] Whether a defendant has been denied his or her right to a speedy

[1] Jones asserts that both his constitutional speedy trial rights and his statutory speedy trial rights under § 971.10, STATS., were violated. Pursuant to § 971.10(4), STATS., the sole remedy for a statutory speedy trial violation is discharge from custody prior to trial. *See* ***Day v. State***, 60 Wis.2d 742, 744, 211 N.W.2d 466, 467 (1973). We therefore address only the constitutional issue.

[2] The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

(continued)

trial is a constitutional question, which we review *de novo*. *See* ***State v. Ziegenhagen***, 73 Wis.2d 656, 664, 245 N.W.2d 656, 660 (1976). The trial court's underlying findings of historical fact, however, are upheld unless they are clearly erroneous. *See* ***State v. Clappes***, 136 Wis.2d 222, 235, 401 N.W.2d 759, 765 (1987); § 805.17(2), STATS.

Under both the Wisconsin Constitution and the United States Constitution, in determining whether a defendant has been denied his or her right to a speedy trial, a court must consider: (1) the length of the delay; (2) the reason for the delay, i.e., whether the government or the defendant is more to blame for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. *See* ***Doggett v. United States***, 505 U.S. 647, 651 (1992); ***Barker v. Wingo***, 407 U.S. 514, 530 (1972); ***Day v. State***, 61 Wis.2d 236, 244, 212 N.W.2d 489, 493 (1973). The first factor, the length of the delay, is a threshold consideration, and the court must determine that the length of the delay is presumptively prejudicial before inquiry can be made into the remaining three factors. *See* ***Doggett***, 505 U.S. at 651–652 ("Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay.");

> process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Article 1, section 7 of the Wisconsin Constitution provides:

> **Rights of accused.** SECTION 7. In all criminal prosecutions, the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

Hatcher v. State, 83 Wis.2d 559, 566–567, 266 N.W.2d 320, 324 (1978). If the length of the delay is presumptively prejudicial and the court determines that, under the totality of the circumstances, the defendant has been denied the right to a speedy trial, the court must dismiss the charges. *See* ***Barker***, 407 U.S. at 522, 533.

With respect to his first trial, Jones argues that he was denied a speedy trial when his trial was delayed as a result of an allegedly improper amendment of the charges against him. Jones was originally charged with first-degree recklessly endangering safety, while armed, as a party to a crime. *See* §§ 941.30(1), 939.63 and 939.05, STATS. On June 9, 1995, a preliminary examination was held, and the trial court found probable cause to believe that Jones committed a felony. On June 22, 1995, Jones requested a speedy trial, and his trial was set for August 23, 1995. On August 23, however, the State moved to amend the information and charge Jones with first-degree attempted homicide. The trial court granted the amendment over Jones's objection. Jones therefore requested, and the trial court granted, an adjournment, and the case was set for trial on November 8, 1995. Jones's first trial began on November 8, and resulted in a mistrial due to a hung jury.

Jones argues that the trial court improperly permitted the amendment of the information, and that the delay that resulted from the amendment deprived him of his speedy trial rights. In applying the ***Barker*** test, we first note that the total time that elapsed between Jones's arrest and his first trial was less than six months. *See* ***Doggett***, 505 U.S. at 655 (speedy trial inquiry triggered by arrest, indictment, or other official accusation). We conclude that this relatively short delay was not so unreasonable as to be presumptively prejudicial. *See* ***Beckett v. State***, 73 Wis.2d 345, 243 N.W.2d 472 (1976) (delay slightly over seven months was not presumptively prejudicial); *cf.* ***Doggett***, 505 U.S. at 652 n.1 ("Depending

on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year."). Therefore, we need not consider the remaining ***Barker*** factors. Nonetheless, we conclude that the remaining factors, considered together, do not support Jones's claim that he was denied his right to a speedy trial.

Jones first asserted his speedy trial right on June 22, 1995, and his trial occurred on November 8, 1995. Jones's argument addresses only the delay from August 23, 1995 to November 8, 1995, apparently conceding that the delay up to that time should not be attributed to the State. We agree that the time that elapsed up until August 23, 1995, is not chargeable to the State, as it was necessary to permit both sides to prepare for trial. We further conclude, as did the trial court, that Jones was not prejudiced by the short delay that resulted from the amendment of the information. Significantly, Jones does not assert that the evidence that was presented at either of his trials was in any way affected by this delay, and we see no indication in the record that it was. Further, Jones did not serve unwarranted jail time as a result of this delay because his probation had previously been revoked and he was serving a sentence that did not expire until after his November trial. We therefore conclude that any prejudice that Jones suffered from the short delay was limited to his anxiety and concern, and was minimal. *See* ***Doggett***, 505 U.S. at 654 (unreasonable delay may prejudice defendant by producing oppressive pretrial incarceration, anxiety and concern of the accused, and an impaired defense due to dimming memories and loss of exculpatory evidence). In light of the relatively short delay that resulted from the amendment, and the minimal prejudice, we conclude that, under the totality of the circumstances, the allegedly improper amendment did not deprive Jones of his right to a speedy trial.

With respect to his second trial, Jones argues that the actions of his trial counsel deprived him of a speedy trial. After Jones's mistrial, his original counsel moved to withdraw from the case. Jones consented to his original counsel's withdrawal, and, on November 21, 1995, the trial court permitted the withdrawal.

Jones's new counsel was appointed on December 11, 1995, and on December 12, 1995, counsel and Jones appeared before the court to set the case for trial. The trial court noted that Jones had requested a speedy trial prior to his first trial, and indicated that if Jones wanted to continue his speedy trial request the court would set the trial within the following ninety days. Jones's new counsel, however, had a congested calendar and was unable to schedule Jones's trial within ninety days. Jones nonetheless insisted that his trial proceed within ninety days; therefore, the trial court permitted Jones's new counsel to withdraw and seek a replacement public defender.

On December 18, 1995, Jones's third counsel was appointed. Counsel and Jones appeared before the court on December 20, 1995, to set the case for trial. At that time, Jones's counsel agreed to an April 1, 1996, trial date, which was more than ninety days from Jones's December 12, 1995, speedy trial request. On January 4, 1996, Jones's third counsel renewed Jones's request for a speedy trial, but did not request that Jones's trial be advanced from its April 1, 1996, trial date. Subsequently, Jones's counsel discovered that he was unable to try Jones's case, and on April 1, 1996, he moved to withdraw. The trial court, therefore, granted an adjournment.

Jones's fourth and final counsel appeared before the court on April 12, 1996, and argued that Jones's speedy trial rights had been violated. The

trial court found that all adjournments had been granted for cause, and that Jones's speedy trial rights had not been violated. The trial court then set Jones's trial for July 15, 1996. Jones's second trial began on the scheduled July 1996 date.

Jones argues that his third appointed counsel deprived him of his right to a speedy trial by failing to discover that he was unable to try the case until April 1, 1996.[3] Again, we conclude that the delay about which Jones complains is not sufficiently long to trigger the speedy trial analysis. Jones's mistrial occurred on November 13, 1995, and Jones was retried on July 15, 1996, approximately eight months later. This delay does not cross the threshold that divides ordinary delay from presumptively prejudicial delay. We additionally conclude that the remaining ***Barker*** factors, considered together, do not support Jones's assertion that he was denied his right to a speedy trial.

Although Jones asserted his right to a speedy trial, some of the eight-month delay that occurred between his mistrial and his retrial is attributable to Jones's actions. Jones consented to the withdrawal of his original attorney, and rejected his second attorney due to his congested calendar. The delays caused by the replacement of these two attorneys are not attributable to the State. We also conclude that the delay between the appointment of Jones's final counsel and his trial was reasonable and necessary, and is not chargeable against the State. Indeed, Jones does not complain that that delay prejudiced his right to a speedy trial; rather, Jones complains only of the delay caused by his third counsel's failure to recognize that he was unable to try Jones's case. The delay caused by counsel's

[3] Jones also asserts that his third appointed counsel deprived him of his speedy trial rights by agreeing to a trial date outside the statutory ninety-day period. A violation of the constitutional right to a speedy trial, however, is not measured by the statutory ninety-day period. *See* ***Beckett v. State***, 73 Wis.2d 345, 347, 243 N.W.2d 472, 474 (1976).

failure, however, was relatively short—approximately three months. Further, Jones has not identified any specific prejudice that he suffered as a result of the delay, and no prejudice is apparent from the record. We therefore conclude, that under the totality of the circumstances, Jones was not denied his right to a speedy trial.

Jones's final argument is that the trial court erred in failing to investigate possible juror misconduct. Jones's trial counsel raised the misconduct issue for the first time at Jones's sentencing proceeding. At sentencing, Jones's counsel said that, upon entering the courthouse on the day the jury returned its verdict, counsel noticed that one of the jurors "smelled like alcohol pretty strongly." Counsel also said that he could not "detect whether it was recent or from the night before or whatever," but that another juror told counsel "that during the deliberations he felt that the jury members had to explain things to this other juror." Jones's counsel made no request regarding the foregoing information, but merely presented it during his sentencing argument. We conclude that the trial court did not err in failing to *sua sponte* hold an evidentiary hearing regarding the possibility that the juror was intoxicated.

First, Jones's counsel failed to raise the issue on the day the jury returned its verdict, and thereby deprived the trial court of the opportunity to directly interview the possibly intoxicated juror. Second, the information that Jones's counsel provided to the trial court was ambiguous and speculative, and thus did not merit an evidentiary hearing. *See* ***State v. Marhal***, 172 Wis.2d 491, 497, 493 N.W.2d 758, 761–762 (Ct. App. 1992) (the right to an evidentiary hearing regarding juror misconduct requires a preliminary showing of facts that, if true, would require a new trial). Moreover, to the extent that Jones's argument relies on juror testimony or juror statements regarding the possibility of juror

intoxication, we must reject such evidence because an investigation into that area "would improperly invade the mental process of the jury, resulting in incompetent evidence according to sec. 906.06(2)." ***State v. Eison***, 194 Wis.2d 160, 176, 533 N.W.2d 738, 744 (1995).

"A litigant's right to impeach a jury verdict is extremely limited. These limitations are founded on public policy considerations including the prevention of jury harassment, encouragement of free and open deliberations, promotion of finality of verdicts and reduction of the incentive for jury tampering." ***State v. Casey***, 166 Wis.2d 341, 345, 479 N.W.2d 251, 252–253 (Ct. App. 1991) (citation omitted). In determining whether a jury verdict may be impeached by juror testimony, a court must consider: (1) whether the proffered evidence is competent; (2) whether the evidence demonstrates a substantial ground sufficient to overturn the verdict; and (3) whether the conviction should be overturned because the defendant's rights were prejudiced. *See* ***id.***, 166 Wis.2d at 345–346, 479 N.W.2d at 253.

Section 906.06(2), STATS., governs the competence of juror testimony offered to impeach a jury verdict. It provides:

> INQUIRY INTO VALIDITY OF VERDICT OR INDICTMENT. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent or to dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.

Section 906.02(6), STATS. In order to establish that juror testimony proffered to impeach a jury's verdict is competent evidence, the party seeking to impeach the verdict must show: (1) that the testimony concerns extraneous information; (2) that the extraneous information was improperly brought to the jury's attention; and (3) that the extraneous information was prejudicial. *See* ***Casey***, 166 Wis.2d at 346–347, 479 N.W.2d at 253. We conclude that juror intoxication is not an extraneous influence, and thus juror testimony regarding the possibility of juror intoxication is incompetent evidence.

In construing Rule 606(b) of the Federal Rules of Evidence, which contains language nearly identical to § 906.06(2), STATS., the Supreme Court has concluded that juror testimony regarding juror intoxication is not competent evidence with which to challenge a jury verdict, and that this prohibition on juror testimony does not violate a defendant's right to an impartial and competent jury. *See* ***Tanner v. United States***, 483 U.S. 107, 121–127 (1987). In arriving at this conclusion, the Supreme Court reasoned that "[h]owever severe their effect and improper their use, drugs or alcohol voluntarily ingested by a juror seems no more an 'outside influence' than a virus, poorly prepared food, or a lack of sleep." ***Id.***, 483 U.S. at 122. The Supreme Court further reasoned that because a defendant may seek to impeach a verdict by nonjuror evidence of juror misconduct, the rule rendering juror testimony incompetent does not violate a defendant's right to an impartial and competent jury. *See* ***id.***, 483 U.S. at 126–127. We conclude that this reasoning is equally applicable to § 906.06(2).

Thus, Jones cannot properly rely on juror testimony or juror statements in support of his argument. Although Jones had the right to challenge the verdict based upon nonjuror evidence of misconduct, as noted, he presented only ambiguous and incompetent evidence of alleged juror misconduct, and thus

failed to make a preliminary showing of facts that, if true, would require a new trial. We therefore conclude that the trial court did not err in failing to *sua sponte* hold an evidentiary hearing on the issue.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.